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IN THE

Supreme Court of the United States

October Term, 1970

No. 642

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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This brief is submitted in reply to the Memorandum for the United States in Opposition submitted by the Solicitor General.

The Government contends that the issues raised in the Petition, involving an employee's power to waive petitioner's Fourth Amendment rights and the voluntariness of that waiver, are not in fact presented. The arguments advanced to support this contention implicitly require the acceptance of one of the following erroneous legal theories:

(1) that a search may be justified by what it uncovers; (2) that where consent is relied on to justify a search, the defendant has the burden of disproving that a valid consent was given; and (3) that once a search warrant is obtained, the agents may search premises other than that described in the warrant so long as they are looking for the type of items described in the warrant.

The Solicitor General argues that because the box belonging to petitioner was found to contain business records of his gambling establishment, the search and seizure of that box without a warrant was permissible (Memorandum in Opposition, p. 4). But, until the agents invaded petitioner's privacy by opening the box and inspecting its contents, they could not be positive that it did not contain his personal papers. The information which the agents possessed might have been sufficient to justify a magistrate to issue a warrant authorizing the search and seizure of the box. But, the fact that the agents' suspicion was proven correct when the box was opened cannot validate the search and seizure without a warrant. "The idea that a search can be justified by what it turns up was long ago rejected." *Bumper v. North Carolina*, 391 U.S. 543, 548.

In urging that the employee could validly consent to the search in question, the Solicitor General states:

> "Significantly petitioner, although given every opportunity to do so, failed to present any evidence to show either Kline's lack of authority or lack of consent." (Memorandum in Opposition, p. 5)

It is true that, at the hearing on the motion to suppress, defense counsel did not offer any evidence on the question of Kline's authority or lack of consent. Instead, defense

counsel rested on the testimony of the agent (1) that at the time he seized the box of records he knew that it belonged to petitioner and that Kline had no proprietary interest in the box; and (2) that Kline had refused on Fifth Amendment grounds to answer question of the agents shortly before two armed agents accompanied Kline to his house and seized the records. These facts were sufficient to show that there had been a search and seizure, without a warrant, of a box which the agents knew belonged to petitioner, not his employee, and that there was serious doubt as to the voluntariness of the employee's consent to the search. If the Government wished to rely on the exception to the warrant requirement based on a valid consent to search, the prosecution had the burden of introducing evidence to show the authority of Kline to consent to the search and the voluntariness of his consent. See *Bumper* v. *North Carolina*, *supra*; *United States* v. *Jeffers*, 342 U.S. 48. Thus, if there was additional evidence available that was relevant on these issues, the Government, and not the defendant, had the burden of offering such evidence.

Finally, the Government argues that the taking of the records from Kline's house, irrespective of his authority, was no different from the seizure of the records from petitioner's business establishment under the authority of the warrant which the agents had obtained (Memorandum in Opposition, p. 5). This argument, however, flies in the face of the accepted principle that

> "The authority to search is limited to the place described in the warrant and does not include additional or different places." *Keiningham* v. *United States*, 287 F.2d 126, 129 (C.A.D.C.); *United States* v. *Zorluck*, 174 F.Supp. 385, 390 (S.D.N.Y.)

In sum, eachr of the arguments advanced by the Solicitor General to justify the search in question on some basis other than consent is contrary to accepted principles of search and seizure law. Thus, the search of the box and the seizure of petitioner's records can only be sustained by a finding that the employee Kline had the power to waive petitioner's Fourt Amendment rights and that his consent to the search was voluntary. In the Petition it was established that the question of a third party's power to waive the Fourth Amendment rights of a criminal defendant and the question of the standards to be applied in determining the voluntariness of a consent to search are questions of importance to the administration of criminal justice on which there is a conflict among the circuits. The Solicitor General does not dispute this. Since those questions are presented here, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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